Ombudsman
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Investigation into closed meetings held by the Niagara District Airport Commission in May 2012

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Ombudsman of Ontario
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Complaint

1 Our Office received a complaint about meetings held by the Niagara District Airport Commission (the commission) on May 3 and 17, 2012. The commission is a joint local board that is responsible for managing the Niagara District Airport on behalf of the three surrounding municipalities: Niagara Falls, St. Catharines and Niagara-on-the-Lake.

2 The commission has nine members – each of the municipal councils appoints one council member and two members of the public to the commission. All of the commissioners serve four-year terms.

3 The complaint alleged that no public notice of the May 3 meeting was provided, and the public was therefore prevented from attending. The complaint about the May 17 meeting alleged that the commission discussed "financial matters" during an *in camera* session, contrary to the *Municipal Act*.

Ombudsman jurisdiction

4 Under the *Municipal Act, 2001* (the Act), municipalities and local boards are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public unless they fall within prescribed exceptions.

5 As of January 1, 2008, changes to the Act gave citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities and local boards that have not appointed their own. The Ontario Ombudsman is the investigator for the commission by default.

6 In investigating complaints about closed meetings, our Office considers whether the open meeting requirements of the Act, and the relevant procedure by-law, have been observed.

Investigative process

7 After conducting a preliminary review of the complaints, our Office notified the commission on July 30, 2012 that we would be conducting an investigation.

8 During the course of our investigation, we obtained and reviewed relevant documents, agendas, minutes and notes. We also considered the commission's procedure by-law, as well as the applicable legislation.

9 In accordance with s. 19(1) of the *Ombudsman Act*, the commission is required to provide our Office with any documents or information requested during the course of our investigations. Commission members and staff co-operated fully with our investigation.

10 A two-person team conducted 11 telephone interviews with members of the commission and relevant staff.

Meeting procedures

11 Regular meetings of the commission are held on the third Thursday of the month at 7 p.m. Most of those we interviewed confirmed that notice of meetings is posted on the commission's website. Commission members receive an email with the meeting agenda 3-4 days in advance of the meeting. Staff advised our Office that the commission also began posting agendas on the website as of June 2012. Prior to that, agendas were only available to the public in hard copy at the meetings.

12 The by-law also states that the Chair may, at any time, call a special meeting with 48 hours notice.

13 The procedure by-law states that meetings will be open to the public, subject to certain exceptions. The by-law lists the exceptions outlined in s. 239 of the Act.

14 The by-law in effect at the time of the May 3 and 17 meetings also stated that "no written or electronic record shall be kept in a closed meeting unless it is for a procedural matter or for giving directions or instructions" to officers, employees, or agents. The by-law was amended in August 2012 and this section was removed. The by-law now states that meeting minutes for both open and closed meetings shall be recorded, and shall include a record of all proceedings, including motions, without note or comment.

Investigative findings

15 As a result of our investigation, we have determined that the commission contravened the open meeting requirements of the Act in a number of respects.

May 3 special meeting

16 The complaint we received about the May 3 meeting was that notice of the meeting was not provided. We also reviewed the substance of this meeting, however, in order to assist the commission in identifying procedural problems and violations of the Act.

17 The information we received during our interviews indicated that notice of the May 3 special meeting was posted on the commission's website at about noon on May 1, 2012. The only item on the agenda was "Closed session – Personal matter about an identifiable individual." No further information was provided about the matter to be discussed.

18 The minutes for the meeting indicate that the commission passed a resolution to proceed into closed session "under the subject matter of 239(2)(b) of the *Municipal Act, 2001*, personal matters about an identifiable individual." No further information was provided in the resolution.

19 There is no information in the minutes about what was discussed during the *in camera* session. We were told during interviews that the *in camera* discussion pertained to comments made a few weeks earlier by the mayor of one of the three municipalities serviced by the commission at a meeting of the Niagara Airport Liaison Committee[1]. According to those we interviewed, the comments stemmed from a letter of complaint about the commission that the mayor received from a member of the public, Mr. William Montgomery.

20 At the May 3 commission meeting, members proceeded *in camera* to discuss the comments made by this mayor, and also to discuss the relationship between the mayor and the commission.

21 Although it appears that information about both the mayor and Mr. Montgomery was discussed during the May 3 meeting, four of those we interviewed said most of

[1] The Airport Liaison Committee consists of the mayors and Chief Administrative Officers of the three municipalities who participate in the Niagara District Airport Commission, as well as the Chair of the NDAC.

the information was about the mayor. Another said the *in camera* meeting involved discussions of a personal nature about both the mayor and the commission Chair, while yet another said much of the discussion involved personal information about Mr. Montgomery.

22 In open session, the commission passed a resolution to "ratify the *in camera* motion to re-affirm confidence in Ruedi Suter as the Chairperson" and "to have the representatives of each municipality along with Bob White and Len O'Connor meet with the mayors to provide an update on the airport."

23 It also passed a resolution in open session to "direct staff and members of the commission to not correspond with William Montgomery or reply to his emails and phone calls, as all communications with Mr. Montgomery are to be directed to the Commission's solicitor." The information we received in our interviews indicates that this was a repeat of a previous motion.

24 Two of those we interviewed told us these votes were only taken in open session. Three others said there might have been some sort of vote – such as a straw poll or "show of hands" – conducted in closed session and then ratified in open session. Another was positive that the commission first voted *in camera* via a show of hands and then ratified the votes in open session.

25 No one with whom we spoke could recall any members of the public being present once the commission returned to open session. All said the commission only passes any necessary motions coming out of a closed session. No further information was provided to the public about what occurred during the *in camera* session.

Analysis

26 Although the complaint we received alleged that no notice of this meeting was provided, we confirmed that notice was provided on the commission's website two days in advance, in accordance with the procedure by-law.

27 The information provided to our Office indicates that on May 3, the commission proceeded *in camera* under the "personal matters about an identifiable individual" exception to discuss negative comments made by a local mayor about the commission in general and the Chair specifically.

28 The *Municipal Act* does not define "personal matters." However, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* contains a similar phrase – "personal information" – that is defined. This definition has been considered by Ontario's Information and Privacy Commissioner and the courts.

While the definition of "personal information" in *MFIPPA* does not dictate how the phrase "personal matters" in the *Municipal Act* should be interpreted, it does provide a useful reference point.

29 Subsection 2(1) of *MFIPPA* defines "personal information" as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual

30 A 2007 decision of the Information and Privacy Commissioner[2] noted that in order to qualify as personal information, the information "must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be personal information about the individual." However, this decision also stated that information relating to an individual in a professional, official or business capacity "may still qualify as personal information if the information reveals something of a

[2] Order MO-2204; (Town of Aylmer) (June 22, 2007)

personal nature about the individual."

31 We were told during our interviews that the commission discussed comments made by a local mayor. These comments were made in the mayor's official capacity and the commission was considering how to respond in its official capacity. The discussion regarding the mayor's professional relationship with the commission does not qualify as personal information.

32 After the preliminary report was released, new information was provided to our Office about this discussion. It was suggested that personal information about a third party had, in fact, been mentioned during the *in camera* session. In any event, the majority of the information we received indicates that the broader discussion was not about personal matters about an identifiable individual. Accordingly, this closed session discussion did not fall within the permitted exceptions to the open meeting requirements.

33 Those we interviewed told us a small part of the *in camera* discussion involved Mr. Montgomery, who wrote the letter of complaint to the mayor about the commission. However, the information provided to us indicates that this discussion was general in nature and did not involve information that was not already available to the public. As such, this portion of the discussion also would not fall within the "personal matters" exception.

May 17 meeting

34 The agenda for the May 17 meeting indicated that the commission would be proceeding *in camera* to discuss "Legal/Financial matters." No further information was provided to the public.

35 The minutes from the open session say the commission passed a resolution in open session to proceed *in camera* "under one of the exceptions under s. 239(2) of the *Municipal Act, 2001*" to consider "Legal/Financial matters."

36 According to the minutes of the *in camera* session, the commission discussed three matters while in camera:

RFP for fixed base operator

37 The information provided to our Office indicates that this discussion involved a RFP (request for proposal) for a new fixed base operator at the airport (a commercial business that provides services such as fuelling and aircraft maintenance). Staff provided an update that the commission's lawyer was

reviewing draft lease agreements.

Tax Arrears – Air Mobile

38 We were advised that Air Mobile was the fixed base operator at the airport for a number of years before going out of business, leaving significant tax arrears owing to the Town of Niagara-on-the-Lake. It appeared the *in camera* discussions involved an update on the commission's plan to pay back the tax arrears over a fixed period of time.

39 According to the Chair, as of May 17 there was a draft Memorandum of Understanding with the town regarding the outstanding taxes, but it had not been ratified. During interviews, we did not receive consistent information as to whether or not the commission had sought legal advice on this matter.

Obligation to Niagara Region for infrastructure stimulus funding

40 The information provided to our Office indicates that this discussion related to a $12-million expansion project for airport infrastructure that the commission was undertaking along with the Regional Municipality of Niagara (the Region). A dispute arose regarding the amount the commission was required to pay for its share of the project.

41 Three of those we interviewed said their understanding was that the Region would take the matter to court to retrieve the funds if a settlement could not be reached. Another characterized the discussion as an attempt to avoid litigation with the Region, and noted that the Region had not threatened litigation and the commission had not sought legal advice. Two others also said there had never been any discussion of litigation. The Chair told us legal advice had not been sought at that point.

42 When the commission reconvened in open session, it voted to:

> Ratify the decision to accept the agreement struck between Mike Galloway [Chief Administrative Officer of the Town of Niagara-on-the-Lake] and the Commission in accordance with the letter from the Town of Niagara-on-the-Lake dated May 11, 2012 regarding Air Mobile tax arrears.

43 The commission also voted to have the Chair and Treasurer meet with two representatives of the Region to discuss the infrastructure stimulus funding issue.

44 Four interviewees told us these matters were first voted on in closed session via a show of hands, and then the votes were ratified in open session. Three others said the votes only took place in open session. Notes taken during the closed session seem to indicate that the commission did reach a consensus while *in camera*.

Analysis

45 The Commission discussed three issues during its May 17 meeting, all under the exception "legal/financial matters." Many of the commission members we interviewed had difficulty identifying which exception under the Act was specifically being used to authorize the closed session. Although the Act contains two exceptions to the open meeting requirements which could be considered "legal matters" – litigation or potential litigation (s. 239(2)(e)) and advice that is subject to solicitor-client privilege (s. 239(2)(f)) – it must be noted that "financial matters" is not one of the enumerated exceptions to the open meeting requirements.

46 It does appear that the commission had received legal advice on the RFP process in general, however, it is not clear that the purpose of the May 17 meeting was to discuss this legal advice or that it was actually discussed during the meeting. Rather, it appears that the purpose of the meeting was to update the commission on the status of the draft lease agreements. There is no indication that the commission's solicitor was present at the meeting, or that any information subject to solicitor-client privilege was discussed. The fact that the commission may have received legal advice on this matter at some point in time does not make every subsequent discussion subject to solicitor client privilege.

47 Although lease agreements may be suitable for discussion *in camera* under the "acquisition or disposition of land" exception (s. 239(2)(c)), this exception was not cited to authorize the May 17 closed session.

48 The commission also discussed an issue regarding outstanding tax arrears. As with the RFP discussion, it appears the commission received legal advice on this tax issue at some point, however there is no indication that legal advice was discussed at this meeting. Rather, it appears the commission discussed a plan to pay back outstanding tax arrears. This subject matter does not fit within any of the exceptions to the open meeting requirements.

49 Finally, the commission discussed an ongoing dispute with the Regional Municipality of Niagara regarding payment for an expansion project for airport infrastructure. The information provided to us indicates that the commission had not sought legal advice on this matter, and that litigation was not ongoing at the time of the meeting.

50 While some commission members felt that litigation was a possibility, this is not sufficient to bring the discussion within the parameters of "litigation or potential litigation." As noted by the Court of Appeal in *RSJ Holdings Inc. v. London (City)*,[3] "The fact that there might be, or even inevitably would be, litigation arising from [the by-law] does not make the 'subject matter under consideration' potential litigation." Mere speculation that litigation might arise in the future is not sufficient to bring this discussion within the scope of the exception set out in s. 239(2)(e) of the Act.

51 For further clarity, the commission should consider passing a resolution that references the specific exception and corresponding section of the Act that it is relying upon for proceeding *in camera*. This would assist commissioners in turning their minds to whether the discussion falls within a permitted exception, such as solicitor-client privilege (s. 239(2)(f)) or litigation or potential litigation (s. 239(2)(e)), rather than relying on the more general "legal matters," which may or may not qualify under the enumerated exceptions in the Act.

Resolution to proceed *in camera*

52 The Act requires that before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board must state by resolution the fact that a closed meeting will be held, as well as the general nature of the subject matter to be considered (s. 239(4)).

53 Our investigation found that, for the May 3 and May 17 closed meetings, the resolution merely stated the general exception, but gave no mention of the subject matter to be considered. Similarly, the closed meeting agendas provide no information to the public other than referring to the exception authorizing the closed session.

54 In my report *Municipal Government by Stealth*, regarding an investigation into a meeting of Council of the Township of Emo, I addressed this issue as follows:

> [S]imply reciting the wording of the exception (in the resolution) doesn't provide very meaningful information. The information should be as specific as possible. A preprinted recitation of exceptions is insufficient to achieve this purpose. As noted by the Ontario Court of Appeal in *Farber v. Kingston (City)*, "the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason

[3] [(2005), 205 O.A.C. 150 (C.A.)]

for excluding the public."

55 In my view, the commission's resolutions authorizing the May 3 and 17 closed sessions were deficient and failed to provide adequate notice to the public of the proposed subject matter and the justification for having an *in camera* meeting.

Voting in closed session

56 The majority of those we interviewed told us the votes taken at the May 3 and 17 meetings were first taken *in camera* via a show of hands, and then formalized with a vote in open session.

57 The Act (s. 239(6)) states that votes may be taken *in camera* if the vote is for a procedural matter, or for the purpose of directing staff. While at least one of these votes (the direction to staff given at the May 3 meeting) could be appropriately taken during an *in camera* session, others – such as the vote to accept an agreement with Niagara-on-the-Lake – clearly do not fit within the exception to the prohibition on *in camera* voting.

58 The prohibition on voting in closed session extends to informal votes, such as straw polls or "shows of hands." In the future, the commission should ensure that votes are only taken in closed session if they comply with the narrow exception outlined in s. 239(6).

Record-keeping practices

59 In accordance with s. 239(7) of the Act, a municipality is required to keep a record of all resolutions, decisions and other proceedings at its meetings. This applies to both open and closed meetings.

60 We found that although minutes were kept of the May 17 closed meeting, there were no minutes or notes kept of the May 3 *in camera* session. In the future, the commission should ensure that a record is kept of all open and *in camera* sessions. In this case, the lack of a meeting record for the May 3 session hampered our efforts to determine what exactly what was discussed and caused delays as we were forced to interview all of those who had attended the meetings. This may have been avoided if there was a complete and accurate record.

61 Ideally, a meeting record of a closed meeting should include reference to:

- where the meeting took place;

- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance, with specific reference to the Clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- any motions, including who introduced the motion and seconders; and
- all votes taken and all directions given.

62 The procedure by-law in effect at the time of these meetings stated that "no written or electronic record shall be kept in a closed meeting unless it is for a procedural matter or for giving directions or instructions" to officers, employees, or agents. This was inconsistent with the commission's obligation to maintain a comprehensive record of closed sessions. When my Office pointed this out at the beginning of our investigation, the commission took prompt action to amend the by-law. The by-law now states:

> The Minutes of Meetings of the Niagara District Airport Commission, whether closed to the public or not, shall be recorded by the Airport Management and shall include the place, date and time of meeting; name of chair and vice-chair; attendance of members and staff; and a record of all proceedings including motions, without note or comment.

63 In the interests of further transparency, a number of Ontario municipalities record audio or video of their meetings and/or allow for them to be broadcast publicly. This is a sound and reasonable approach, as it helps to ensure that there is a clear, comprehensive and accessible record of meetings.

64 As this investigation demonstrates, in the case of *in camera* meetings, I am often forced to wade through incomplete minutes and conflicting recollections to attempt to reconstruct what took place behind closed doors, in order to assess whether the closed meeting rules were followed. Although the commission has already taken action to ensure that a more comprehensive record of closed meetings is kept, both the commission and the public interest would be better served if audio or video recordings were made of all *in camera* meetings for future reference. It would also allow for expeditious investigation of closed meeting complaints.

65 Several jurisdictions in the United States require that closed municipal meetings be

electronically recorded or videotaped, and others have adopted this practice to enhance the accountability and transparency of their proceedings. For example, the Illinois *Open Meetings Act* states that all public bodies must keep a verbatim record of all their closed meetings in the form of an audio or video recording. Similarly, Iowa's legislation requires that audio recordings be made of all closed sessions, and Nevada requires that public bodies record audio of open and closed meetings or use a court stenographer to transcribe the proceedings.

Reporting back in open session

66 It is not the commission's practice to report back in open session about what occurred in an *in camera* meeting, except to the extent that certain motions are voted on in open session that refer to votes taken in closed session.

67 I encourage municipalities and local boards to report publicly in open session on what transpires in closed session, at least in a general way. In some cases, public reporting might simply consist of a general accounting in open session of the subjects considered in closed session – similar to the information in the resolution authorizing the session, together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided.

Opinion

68 Our investigation confirmed that the Niagara District Airport Commission held illegal closed meetings on both May 3 and May 17:

- The commission's discussion in closed session at the May 3 meeting under the "personal matters about an identifiable individual" exception did not fit within the parameters of that or any exception.
- The commission's discussion of tax arrears and a dispute with the Regional Municipality of Niagara at the May 17 meeting was held *in camera*, and "legal/financial matters" was cited as the exception. These matters did not fit within the parameters of any exception.

69 There were also some procedural violations that were identified including:

- The commission discussed one item *in camera* at the May 17 meeting (RFP for fixed base operator – draft lease agreements), citing "legal/financial matters". Although this item could have properly fit within the "acquisition or disposition of land" exception, this exception was not cited in the

resolution to proceed *in camera*.

- The commission improperly voted while *in camera* at the May 3 and May 17 meetings by reaching a consensus on matters that were not procedural, and not a direction to staff.

70 During our investigation, we also observed some problematic practices, including:

- The commission's closed session minutes do not always accurately reflect all relevant discussions that took place *in camera*.
- The commission failed to report back during open session on what was discussed during the closed session.

71 The commission members we interviewed expressed willingness to receive comments and recommendations from my Office. In fact, the commission acted promptly to amend its procedure by-law based on suggestions made by my staff while this investigation was still ongoing.

72 I am making the following recommendations, which I hope will help the commission meet its legal obligations with respect to closed meetings as well as generally improve its closed meeting practices.

Recommendations

Recommendation 1
The Niagara District Airport Commission should ensure that discussions that take place in closed session under an exception to the *Municipal Act's* open meeting requirements are limited to those matters that the commission is permitted to discuss *in camera* under the exceptions in the Act.

Recommendation 2
The Niagara District Airport Commission should ensure that its meeting agendas and resolutions identify the items to be considered in closed session accurately and with as much detail as possible, given the nature of the subject matter. The agenda should also indicate, for each item to be considered, the applicable exception under the *Municipal Act*.

Recommendation 3
The Niagara District Airport Commission should ensure that no vote is taken at a closed meeting except in accordance with the Act. Informal votes via a "show of hands" should not be taken *in camera*.

Recommendation 4

The Niagara District Airport Commission should audio and/or video record all *in camera* meetings and store such recordings in a confidential and secure fashion for future reference.

Recommendation 5
The Niagara District Airport Commission should follow a practice of reporting back publicly after a closed meeting, providing at least a general account of all matters considered *in camera*.

Recommendation 6
All members of the Niagara District Airport Commission should be vigilant in adhering to their individual and collective obligation to ensure that the commission complies with its responsibilities under the Act and its own procedure by-law.

Preliminary report

73 In accordance with our procedures, the commission was given an opportunity to review a report containing preliminary investigative findings and analysis, and to make any relevant representations before the report was finalized. Members of the commission and staff had the option of receiving a copy of the preliminary report for review upon signing a confidentiality undertaking.

74 Three members of the commission provided written comments on the preliminary report. The Chair confirmed that the commission has taken steps to adopt all of my recommendations contained in this report. With regards to the recommendation to record all *in camera* meetings, the Chair advised that efforts are underway to implement this recommendation at the next opportunity.

75 The additional comments received were taken into account in preparing the final report.

Final report

76 I am pleased the Niagara District Airport Commission has accepted all of my recommendations.

77 My report should be shared with the commission and be made available to the public as soon as possible, and no later than the next commission meeting.

André Marin
Ombudsman of Ontario